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Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM 1993

WORLDWIDE INSURANCE
MANAGEMENT CORPORATION,
Petitioner,

v.

RESOLUTION TRUST CORPORATION IN
ITS CAPACITY AS RECEIVER FOR
METROPOLITAN FINANCIAL FEDERAL
SAVINGS AND LOAN ASSOCIATION,
SUCCESSOR IN INTEREST TO METROPOLITAN
FINANCIAL SAVINGS AND LOAN ASSOCIATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does a federal district court have discretion to grant a Motion for Substitution pursuant to Rule 25(c), Federal Rules of Civil Procedure, after the jury has rendered its verdict and such substitution modifies and enlarges the moving parties substantive rights?

II. Whether the district court erred, as a matter of law, in failing to recognize the Resolution Trust Corporation as Conservator, as a distinct legal entity with distinct legal capacity, from the Resolution Trust Corporation as Receiver under FIRREA?

LIST OF PARTIES

The parties to the proceedings below were the Petitioner Worldwide Insurance Management Corporation and the Respondent Resolution Trust Corporation in its capacity as Receiver for Metropolitan Financial Federal Savings and Loan Association, Successor in Interest to Metropolitan Financial Savings and Loan Association.

Petitioner Worldwide Insurance Management Corporation has no parent companies, subsidiaries or affiliates to list pursuant to the Rules of the Supreme Court of the United States, Rule 29.1.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
AUTHORITIES CITED	v
OPINION BELOW	2
JURISDICTION	2
STATUTE INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	10
I. FIRREA ESTABLISHED THE RESOLUTION TRUST CORPORATION (RTC) AND ENABLED THE RTC TO ACT IN A CORPORATE CAPACITY, A RECEIVER CAPACITY AND/OR A CONSERVATOR CAPACITY. THE CIRCUIT COURTS ARE IN CONFLICT AS TO WHETHER THE RTC ACTING IN ITS VARIOUS CAPACITIES IS A SINGLE LEGAL ENTITY OR THREE SEPARATE ENTITIES, EACH WITH DISTINCT LEGAL CAPACITY	10

Table of Contents cont'd.

PAGE

II. THE TRIAL COURT'S DECISION ALLOWING SUBSTITUTION OF A NEW PARTY PLAINTIFF ON A MOTION MADE ONE WEEK AFTER TRIAL MODIFIED AND ENLARGED THE RESPONDENT'S SUBSTANTIVE RIGHTS IN VIOLATION OF 28 U.S.C. § 2072 20

CONCLUSION 23

APPENDIX (JUDGMENT OF THE COURT OF APPEALS AND MEMORANDUM DECISION AND ORDER OF THE DISTRICT COURT) . A-1

TABLE OF AUTHORITIES

CASES: **PAGE**

Angel v. Bullington, 330 U.S. 183 (1947) 21

FDIC v. Clark, No. 91-8259 (5th Cir., March 16, 1992) (Per Curiam) (Unpublished) 958 F.2d 1079 (Table) 15

FDIC v. Condits, 861 F.2d 853 (5th Cir. 1988) 17

FDIC v. La Rambla Shopping Ctr., Inc., 791 F.2d 215, 218-219 (1st Cir. 1986) 11, 12

FDIC v. Lauterbach, 626 F.2d 1327, 1330 n. 4 (7th Cir. 1980) 13

FDIC v. Wheat, 970 F.2d 124 (5th Cir. 1992) 13

Grant County Savings and Loan Association v. RTC, 770 F.Supp. 1374, 1383 (E.D. Ark. 1991) 11, 12

Resolution Trust Corporation v. Murray, 935 F.2d 89 (5th Cir. 1991) 15

RTC v. Camp, 956 F.2d 25 (5th Cir. 1992) 14

Table of Authorities cont'd.

STATUTES AND RULES: **PAGE**

12 U.S.C. 1441a et. seq. 2

12 U.S.C. § 1441a(b) 11

12 U.S.C. § 1821, et seq. 7

12 U.S.C. § 1821(c)(2)(A) 12

12 U.S.C. §1821(c)(2)(A) 12

28 U.S.C. 1441 2

28 U.S.C. § 2072 . . . . . 3, 20

28 U.S.C. § 2072(b) 22

28 U.S.C., Sec. 1254(b) 3

Rule 25(c), Federal Rules of Civil Procedure 20-23

Rules Enabling Act of 1934 21

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PETITION FOR WRIT OF CERTIORARI

The Petitioner Worldwide Insurance Management Corporation respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of

Appeals for the Fifth Circuit entered in the above-entitled proceedings on April 30, 1993.

OPINION BELOW

The Court of Appeals for the Fifth Circuit affirmed the decision of the United States District Court for the Northern District of Texas without entering an opinion.

The Memorandum Opinion and Order of the United States District Court for the Northern District of Texas (Cobb, H.J. sitting by assignment from E.D. Texas) has not been reported. It is reprinted in the Appendix hereto, p. A-1, infra.

JURISDICTION

Invoking 28 U.S.C. 1441 removal jurisdiction Respondent removed this suit from Texas State District Court to the United States District Court for the Northern District of Texas (Dallas Division). The removal was based on 12

U.S.C. 1441a et. seq. On November 20, 1990, the Northern District denied the Respondent's Motion for Summary Judgment. The suit was tried to a jury, which resulted in a judgment for the Respondent on July 24, 1992.

On Petitioner's Appeal, the Fifth Circuit on April 30, 1993 affirmed the Northern District's opinion without filing an opinion. Petitioner sought a Petition for Rehearing which was denied on June 1, 1993.

The jurisdiction of this Court to review the Judgment of the Fifth Circuit is invoked under 28 U.S.C. § 1254(b).

STATUTE INVOLVED

28 U.S.C. § 2072; Rules of Procedure and Evidence states:

> a. The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before

magistrates thereof) and courts of appeals.

b. Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

STATEMENT OF THE CASE

Petitioner is one of the guarantors of a promissory note in the principal amount of $3,000,000.00 ("Note") executed on or about August 10, 1986 by Airline Passengers Association, Inc. and International Airline Passengers Association (collectively referred to as "APA") in favor of Metropolitan Financial Savings and Loan ("Closed Bank"). The proceeds of the Note were used by APA to purchase an office building located in Dallas, Texas ("Property"). The Note was secured by (a) certificates of deposit in the face amount of $750,000.00 ("CDs"); (b) a first lien on the Property; (c) the guaranty executed by

Petitioner; and (d) the guaranty executed by Lawrence E. Moffitt ("Moffitt").

In August, 1988, APA defaulted in the payment of the Note. At the time of the default, the unpaid principal balance of the Note was $2,970,678.08. On September 19, 1988, the Closed Bank elected to accelerate the Note, and thereafter, to foreclose on the CDs and the Property. The unpaid principal balance of $2,970,678.08 was reduced by: (a) the amount of $753,327.73, the value of the CDs; and (b) the amount of $1,300,000.00, the funds applied by the Closed Bank from the foreclosure of the Property. As a result of these reductions, the remaining unpaid principal balance due the Closed Bank as of November, 1988, was $981,364.46 ("unpaid principal balance").

Although the Closed Bank made demand upon the guarantors for payment of the unpaid principal balance, neither guarantor

paid. Petitioner Worldwide contended: (a) the Respondent (Plaintiff below) could not recover in the capacity in which it brought suit; (b) its guaranty was ambiguous; (c) its liability under its guaranty was limited to the first fifty percent (50%) of the unpaid principal balance due at the time of default; (d) its liability had been satisfied in full by the proceeds from the foreclosures of the CDs and the Property; and (e) it owed no money under its guaranty. Petitioner argued that its maximum exposure under its guaranty was, at the time of default, limited to the first $1,485,339.04 (the first fifty percent [50%] of the $2,970,678.08), and since, after default, the Note was reduced by over $2,000,000.00, Petitioner's guaranty had been satisfied in full.

On or about February 27, 1989, the Closed Bank instituted a civil action in State District Court in Dallas, Dallas

County, Texas ("State Action"). On or about August 10, 1989, the Office of Thrift Supervision ("OTS") declared the Closed Bank insolvent and appointed the Resolution Trust Corporation as Receiver of the Closed Bank. Pursuant to a Purchase and Assumption Agreement, the Resolution Trust Corporation as Receiver ("RTC-R") of the Closed Bank transferred certain assets of the Closed Bank, including the Note and Petitioner's guaranty, to Metropolitan Financial Federal Savings and Loan Association ("Metropolitan Federal"), a new federally chartered association organized under the Federal Institutions, Reformed, Recovery and Enforcement Act of 1989 ("FIRREA"), 12 U.S.C. § 1821, et seq. On or about August 10, 1989, the OTS appointed the Resolution Trust Corporation as Conservator of Metropolitan Federal ("RTC-C").

On September 8, 1989, the RTC-C substituted for the Closed Bank in the State Action and filed its Notice of Removal removing the present case from state court to federal court.

On June 15, 1990, the RTC-C filed its Motion for Summary Judgment against Petitioner. On November 20, 1990, the Honorable Sidney A. Fitzwater denied the RTC-C's Motion for Summary Judgment holding that Petitioner's guaranty was ambiguous as a matter of law.

During the trial, Petitioner made a Motion for Directed Verdict and a Motion for an Instructed Verdict based on Respondent's failure to establish ownership of the note and guaranty, an essential element of Respondent's burden of proof. Both motions were noted as timely made but were overruled. Approximately a week after the trial, the Resolution Trust Corporation as Receiver for Metropolitan Financial

Federal Savings and Loan Association Successor in Interest to Metropolitan Financial Savings and Loan ("RTC-R"), inter alia, filed a Motion to Substitute (requesting that the RTC-R be substituted as party plaintiff for the RTC-C), a Motion for Leave to File Amended Complaint to conform to the evidence and a Motion for Judgment in favor of the RTC-R. Petitioner, inter alia, filed a Response to Respondent's Motions and a Motion for Judgment Notwithstanding the Verdict.

Judge Cobb in his Memorandum Opinion granted Respondent's Motions for Substitution, for Leave to File Amended Complaint, and Judgment, while overruling all of Petitioner's Motions. The Court thereafter signed the Judgment on July 24, 1992.

REASONS FOR GRANTING THE WRIT

I. FIRREA ESTABLISHED THE RESOLUTION TRUST CORPORATION (RTC) AND ENABLED THE RTC TO ACT IN A CORPORATE CAPACITY, A RECEIVER CAPACITY AND/OR A CONSERVATOR CAPACITY. THE CIRCUIT COURTS ARE IN CONFLICT AS TO WHETHER THE RTC ACTING IN ITS VARIOUS CAPACITIES IS A SINGLE LEGAL ENTITY OR THREE SEPARATE ENTITIES, EACH WITH DISTINCT LEGAL CAPACITY.

The Financial Institution Reform and Recovery Enforcement Act of 1989 ("FIRREA") established the Resolution Trust Corporation ("RTC") to administer the assets of insolvent thrifts that were once insured by the FSLIC and that are placed in a conservatorship or a receivership between January 1, 1989 and August 9, 1992. FIRREA appoints the FDIC as manager of the RTC. FIRREA provides that the RTC shall have the same powers and rights to carry out its duties as the FDIC has when it is acting as a corporation, or as a conservator of an insured depository institution, or as a

receiver of an insured depository institution. 12 U.S.C. § 1441a(b).

The Fifth Circuit in its affirmation of the trial court's judgment impliedly refuses to recognize that the RTC-C and the RTC-R were distinct legal capacities and each is a different legal entity (Appendix p. A-7 - A-9).

Judge Cobb, in his Memorandum Opinion, pointed out that Grant County Savings and Loan Association v. RTC, 770 F.Supp. 1374, 1383 (E.D. Ark. 1991) recognized such distinction in dicta only, but did not hold that the RTC-R and the RTC-C were different entities. (Appendix p. A-8). Judge Cobb also distinguished FDIC v. La Rambla Shopping Ctr., Inc., 791 F.2d 215, 218-219 (1st Cir. 1986) which dealt with the separate legal entities of the FDIC corporate and the FDIC receiver. Judge Cobb writes that: (a) the different entities applies to the FDIC and not the

decided before the 1989 enactment of FIRREA which creates the RTC.

Contrary to Judge Cobb's Memorandum Opinion, the enabling statutes, 12 U.S.C. § 1821(c)(2)(A), authorizes the Resolution Trust Corporation to act in separate and distinct capacities; to-wit: Conservator or Receiver. In Grant, the district court stated at 1383:

> "The enabling statutes authorized the FDIC and the RTC to act in separate and distinct capacities, such as conservator or receiver for a failed institution." See e.g., 12 U.S.C. § 1821(c)(2)(A).

Due to the different capacities in which the FDIC and the RTC may act, courts have recognized that each capacity is a separate legal entity.

The district court in Grant cited as authority the La Rambla case. In La Rambla, the district court stated at 791 F.2d 218:

> "Both the FDIC's authorizing statutes and case law recognize the dual role that the FDIC often plays in respect to a failed bank. They provide the FDIC with two (2) virtually separate, legal entities, one as a 'corporation', when, for example, it buys a failed bank's assets, and another, as "receiver" of a failed bank."

In a recent Fifth Circuit decision dealing with the FDIC (as opposed to the RTC) the Fifth Circuit clearly recognized as separate entities the FDIC acting in its corporate capacity, and the FDIC acting as receiver. In FDIC v. Wheat, 970 F.2d 124 (5th Cir. 1992) the Court of Appeals stated in Footnote 5, at 127:

> "FN5. The FDIC/Receiver has all rights and duties as any other receiver would in accordance with the laws of the state where the insolvent bank is organized. When the FDIC/Receiver assigns rights, title and interest in the assets of the failed institution to the FDIC/ Corporate, then the rights and obligations of the FDIC/Corporate are determined by applicable federal law... FDIC v. Lauterbach, 626 F.2d 1327, 1330 n. 4 (7th Cir. 1980) (FDIC,

> as two (2) separate entities, may deal with itself);..."

In another Fifth Circuit decision, the Court appears to draw an absolute parallel between the separate and distinct legal entities (receiver and conservator) of the FDIC, on the one hand, with the separate and distinct legal entities (receiver and conservator) of the RTC. In RTC v. Camp, 956 F.2d 25 (5th Cir. 1992) the Fifth Circuit cites as authority for a case involving the RTC, a case involving the FDIC. In Camp at 965 F.2d at 29 in Footnote 1, this court states:

> "FN1. For instance, in a recent case, we reversed summary judgment because of evidence in the record that the FDIC, as receiver of a failed institution, had conveyed certain assets of a failed bank to another bank in a purchase and assumption agreement, and conveyed other assets to the FDIC-Corporate pursuant to a contract of sale. Therefore, the Appellants in that case had demonstrated the real question as to the identity of the owner and holder of the note in

question. FDIC v. Clark, No. 91-8259 (5th Cir., March 16, 1992) (Per Curiam) (Unpublished) 958 F.2d 1079 (Table)."

Another Fifth Circuit case which acknowledges RTC-R and RTC-C as distinct legal entities is Resolution Trust Corporation v. Murray, 935 F.2d 89 (5th Cir. 1991). In Murray, a state bank was closed and the RTC as Receiver was appointed to supervise its assets. Simultaneously, a new bank was formed, substantially all of the assets of the closed bank were transferred to the new bank, and the RTC as conservator was placed in charge of the new bank. The RTC in its capacity as Receiver moved to substitute and then removed the case to federal court. After the removal to federal court, the RTC as Conservator moved to amend the substitution order filed in state court. Although this move in state court was ineffective and too late, the RTC as

Conservator also filed an ex parte motion in federal court to amend the notice of removal and to reflect the distinct capacities in which the RTC was a party to the proceedings.

Unlike the facts of the instant case, an attempt was made to bring in the proper party in federal court shortly after removal, and before trial, by filing an ex parte motion. The Fifth Circuit held that this ex parte motion placed the legal imprimatur for formal substitution of the proper RTC parties in the case. In addressing the action, the Fifth Circuit Court states at 935 F.2d 92:

> "The Murrays first contend that RTC's attempt to correct its capacities and properly make RTC as conservator the party plaintiff in the removal case was ineffective because it involved the state court after removal. The Murrays are correct that a state court has no power to proceed with the case which has been properly removed to federal court.... We therefore, cannot recognize the

> state court's October 9, 1989, amended substitution order reflecting RTC as conservator of Delta FA as the party plaintiff and RTC as receiver of Delta, Inc. as the defendant in reconvention.
>
> The federal district court, however, identified RTC as conservator of Delta FA as party plaintiff to the proceedings when it allowed RTC's October 30, 1989, amended notice of removal. Although the original notice was not in proper form, the amended notice indicated the proper capacities in which RTC is a party to the proceedings...."

Petitioner has found no case with facts identical to the facts of the instant case. A case with the facts close to the instant case is FDIC v. Condits, 861 F.2d 853 (5th Cir. 1988). The Condits originally borrowed money from Mercantile National Bank of Dallas. They subsequently transferred their banking business to Moncor Bank of Hobbs, New Mexico ("Moncor"), and eventually defaulted on those notes. Moncor sued the Condits and

the Condits asserted numerous affirmative defenses and counterclaims. The Condits' counterclaims alleged misbehavior of bank officials, as well as unrelated tort claims and both state and federal statutory claims. Moncor was declared insolvent and the FDIC-R was appointed Receiver. The FDIC-R then transferred certain assets, including the Condits' notes, to FDIC-C in return for monies from the FDIC Insurance Fund. The FDIC-C moved to substitute itself as the sole Plaintiff and Counter-Defendant in place of the FDIC-R. Although the district court provided the Condits with an opportunity to oppose the motion on substantive grounds, the Condits failed to respond. Thereafter, the Court granted FDIC-C's motion and substituted the FDIC-C as the only party adverse to the Condits in the action.

Approximately 1-1/2 years later, the FDIC-C moved to amend its Complaint, amend

its Reply to the affirmative defenses and counterclaims, to dismiss the counterclaims, and for Summary Judgment. The Condits then moved to compel the joinder of the FDIC-R, demonstrating their belief that the FDIC-C was the sole adverse party presently in the case.

The district court granted FDIC-C's Motion for Summary Judgment and dismissed the Condits' counterclaims. The Court also denied the Condits' motion to join FDIC-R. In affirming the district court's decision, the Fifth Circuit Court stated at 861 F.2d 858:

> "The FDIC in this case, attempting to collect on the obligations owed by the Condits to the failed bank, changed its headwear in March, 1986. Removing the ten-gallon hat it wore as Receiver, it donned the bowler of FDIC-Corporate. The Condits watched the change of attire silently. Because the district court did not err by deciding not to revisit the issue in December, 1987, its judgment is AFFIRMED."

In the case at bar, the Fifth Circuit's affirmation of the District Court's opinion is in direct conflict with earlier decisions of the Fifth Circuit and is in conflict with decisions of the Second Circuit and the Eastern District Court of Arkansas. Additionally, the Fifth Circuit's decision is in conflict with the plain meaning of the statute which created the Resolution Trust Corporation. The Fifth Circuit has thus created a confusing precedent, likely to generate even further confusion among the other circuits. It is a precedent directly at odds with the plain meaning of FIRREA. Plenary consideration of the matter by this Court is essential.

II. THE TRIAL COURT'S DECISION ALLOWING SUBSTITUTION OF A NEW PARTY PLAINTIFF ON A MOTION MADE ONE WEEK AFTER TRIAL MODIFIED AND ENLARGED THE RESPONDENT'S SUBSTANTIVE RIGHTS IN VIOLATION OF 28 U.S.C. § 2072.

Rule 25(c), Federal Rules of Civil Procedure, is a rule of procedure and is

not intended to, nor can it affect either the Plaintiff's burden of proof or Defendant's substantive rights. However, in the instant case, the trial court's use of Rule 25(c) both changed the burden of proof and affected Petitioner/ Defendant's substantive rights. The United States Supreme Court stated in Angel v. Bullington, 330 U.S. 183 (1947) at 198:

> "....In matters of procedure and jurisdiction, I take it, no one would contend that the doctrine of Erie Railroad Co. v. Tompkins is applicable. One may regret that the line of the Great Divide between substance and procedure cannot be clearly marked so that all may agree as to its location in any one case. But that line exists. We have said that federal courts must follow the law of the state as to burden of proof.... The reason for these conclusions is to gain the desirable end of a symmetry of law within each state...."

When the Federal Rules of Civil Procedure were promulgated pursuant to the Rules Enabling Act of 1934, that statute

and the cases construing it established the following standard: A rule is valid if it "really regulates procedure" and does not "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). In the present case, the trial court changed the burden of proof and affected Texas substantive law by substituting the RTC-R in the place of the RTC-C.

To substitute, after trial, a new party in the place of the Respondent/ Plaintiff so that after trial the party being substituted causes the burden of proof to be made, enlarges the substantive rights of the Respondent/Plaintiff and abridges the substantive rights of the Petitioner/Defendant. In other words, but for the substitution of the RTC-R for the RTC-C, the RTC-C failed to meet its burden of proof as required by well established Texas law. The trial court, by and through Rule 25(c), Federal Rules of Civil

Procedure, has transmuted "lead into gold" for the RTC-C and the RTC-R. Such transmutation is contrary to the policy of the U.S. Supreme Court.

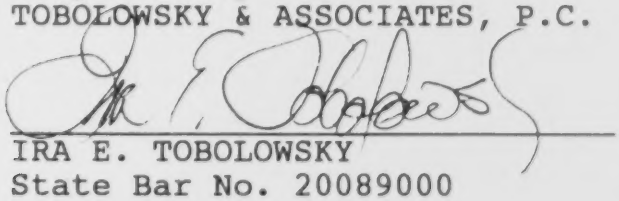
Almost two (2) years before trial, the RTC-C transferred the Note and Petitioner's guaranty to the RTC-R. Thereafter, the RTC-R either kept the Note and Petitioner's guaranty and/or transferred it to United Savings. For approximately two (2) years, the RTC-C and the RTC-R knew that the RTC-C was not the owner and holder of the Note and Petitioner's guaranty, but waited until after trial to spring a motion for substitution under Rule 25(c), Federal Rules of Civil Procedure. Such action by the RTC-R and the RTC-C is not fair, reasonable, or just, and such substitution is not legal.

CONCLUSION

For these reasons, this Petition for Certiorari should be granted. If the

Petitioner is correct in urging that the Resolution Trust Corporation acting in its capacity as Conservator, is a distinct and separate legal entity from the Resolution Trust Corporation acting in its capacity as Receiver, then the Plaintiff below failed to meet its burden of proof and the matters should be remanded to the District Court for appropriate disposition based on this determination.

Respectfully submitted,
TOBOLOWSKY & ASSOCIATES, P.C.



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APPENDIX (JUDGMENT OF THE COURT OF APPEALS AND MEMORANDUM DECISION AND ORDER OF THE DISTRICT COURT)

IN THE UNITED STATES DISTRICT
FOR THE NORTHERN DISTRICT OF
DALLAS DIVISION

RESOLUTION TRUST CORPORATION, AS CONSERVATOR FOR METROPOLITAN FEDERAL SAVINGS AND LOAN ASSOCIATION, SUCCESSOR IN INTEREST TO METROPOLITAN FINANCIAL SAVINGS AND LOAN ASSOCIATION,	
Plaintiff,	CA3: 89-cv-2313
VS.	
WORLD-WIDE INSURANCE MANAGEMENT CORPORATION AND LAWRENCE E. MOFFITT,	
Defendants.	

MEMORANDUM OPINION

The following motions are before the court:

1. Resolution Trust Corporation as Receiver's Motion to Substitute,

2. Resolution Trust Corporation as Receiver's Motion to File Amended Complaint to Conform to the Evidence,

3. Resolution Trust Corporation as Receiver's Motion for Judgment,

4. World-Wide Insurance Management Corporation's Motion for Judgment Notwithstanding the Verdict,

5. World-Wide Insurance Management Corporation's Motion to Withdraw Announcement of Ready,

6. World-Wide Insurance Management Corporation's Motion for Remand, and

7. World-Wide Insurance Management Corporation's Motion for Leave to File Cross-Claim and/or Counterclaim.

FACTS

On February 27, 1989, Metropolitan Financial Savings and Loan Association (Metro Financial), an FDIC-insured, state-chartered savings association, sued World-Wide Insurance Management Corporation (World-Wide) to enforce a guaranty agreement (the World-Wide guaranty). It is uncontroverted that Metro Financial was the owner and holder of the World-Wide guaranty.

On August 10, 1989, four important events occurred. First, the Office of Thrift Supervision (OTS) appointed the Resolution Trust Corporation as receiver (RTC-R1) for Metro Financial. Second, the

OTS authorized the creation of Metropolitan Financial Federal Savings and Loan Association (Metro Federal), a federal savings association formed to take over the assets and liabilities of Metro Financial. Third, the RTC-R1 transferred all of Metro Financial's assets, including the World-Wide guaranty, to Metro Federal. Fourth, the OTS appointed the RTC as conservator (RTC-C) for the newly created Metro Federal. Upon appointment as conservator, the RTC-C succeeded by operation of law to all title of Metropolitan Federal to the World-Wide guaranty agreement under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA). See 12 U.S.C. §1441a(b)(4) (Supp. 1992); 12 U.S.C. §1821(d)(2)(A)(i) (1989). On September 8, 1989, the RTC-C intervened in this suit as a named party plaintiff. On June 22, 1990, the OTS replaced the RTC-C with the RTC as

receiver for Metro Federal (RTC-R2), and the RTC-R2 succeeded to all title of the RTC-C to the World-Wide guaranty agreement under FIRREA. See 12 U.S.C. §§1441a(b)(4), 1821(d)(2)(A)(i). Later, the RTC-R2 conveyed the performing assets of Metro Federal to United Savings and retained the non-performing assets. The World-Wide guaranty was a non-performing asset, and the RTC-R2 retained it.

Jury trial to construe the terms of the guaranty agreement commenced on June 1, 1992. At trial, World-Wide unsuccessfully objected under Rule 17(a) that the RTC-C was not the real party in interest and moved for dismissal because the RTC-R now owns the World-Wide guaranty. The court properly denied World-Wide's motion and

continued the trial in the name of the original parties.[1]

MOTION TO SUBSTITUTE

The RTC-R2 now moves for substitution of the RTC-R2 for the RTC-C as the named party plaintiff under Federal Rule of Civil Procedure 25(c).[2] The rule provides:

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[1] Rule 25(c), not Rule 17(a), applies when the real party in interest commences a suit and then subsequently transfers its interest to another party. Fronings, Inc. v. Johnston Feed Serv., Inc., 568 F.2d 108, 109-110 (8th Cir. 1978); Veverica v. Drill Barge Buccaneer No. 7, 488 F.2d 880, 886 (5th Cir. 1974); International Rediscount Corp. v. Hartford Accident and Indemnity Co., 425 F.Supp. 669, 674 n. 14 (D. Del. 1977). Under Rule 25(a), the trial court may allow suit to continue in the name of the original parties in the absence of a rule 25(c) motion. Froning's, 568 F.2d at 110; see Singer Housing Co. v. Seven Lakes Venture, 466 F. Supp. 369, 378 (D. Colo. 1979); International Rediscount, 425 F. Supp. at 674.

[2] The substitution is unnecessary, except to clarify to whom the ultimate judgment in this case should be paid. See Otis Clapp & Son, 754 F.2d at 743 (judgment is binding on successor in interest).

> In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule.

Id. Rule 25(c) may be invoked before or after judgment. Otis Clapp & Son, Inc. v. Filmore Vitamin Co., 754 F.2d 738, 743 (7th Cir. 1985); Veverica v. Drill Barge Buccaneer No. 7, 488 F.2d 880, 886 (5th Cir. 1974).

In opposition to the RTC-R2's motion for substitution, World-Wide argues that the RTC-R2 has no standing to file motions because the RTC-C and not the RTC-R2 is the named plaintiff. According to World-Wide, the RTC-R2 and the RTC-C are distinct legal entities, and the RTC-R2 is therefore not properly before the court. World-Wide's argument fails for two reasons.

First, even assuming for argument's sake that the RTC-R2 and the RTC-C are separate legal entities, that fact does not make substitution of parties under Rule 25(c) inappropriate because Rule 25(c) clearly contemplates the transfer of interest from one legal entity to another. Fed. R. Civ. P. 25(c); cf. Otis Clapp & Son, 754 F.2d at 743.

Second, the authority World-Wide cites in support of its separate entity theory is distinguishable. In Grant County Sav. & Loan Ass'n v. Resolution Trust Corp., 770 F. Supp. 1374, 1383 (E.D. Ark. 1991), the court recognized in dicta that the RTC may act in more than one capacity; the court did not hold that the RTC-R and the RTC-C are distinct legal entities. Indeed, the Grant court held that an amount owed by a savings and loan to the RTC-C could be offset against a Receivers Certificate issued to the savings and loan by the RTC-R

despite the RTC's dual capacities. Id. at 1382-85. FDIC v. La Rambla Shopping Ctr., Inc., 791 F.2d 215, 218-219 (1st Cir. 1986), deals with the separate legal entities of the FDIC Corporate and the FDIC Receiver regarding the purchase of a failed bank. The La Rambla case does not address the RTC's dual capacity. In fact, the La Rambla case was decided before the 1989 enactment of FIRREA which created the RTC. See 12 U.S.C. §1441a(b)(1)(A) (Supp. 1992).

Accordingly, the motion for substitution of parties is granted.

MOTION TO FILE AMENDED COMPLAINT

The RTC-R2 moves to amend the complaint to conform the pleadings to the evidence presented at trial under Federal Rule of Civil Procedure 15(b). The proposed amendment substitutes the RTC-R2 for the RTC-C as the named party plaintiff and current owner and holder of the World-Wide guaranty.

The purpose of Rule 15(b) is to align the pleadings with the evidence presented at trial and to obviate the need for new trials. See, Cole v. Layrite Products Co., 439 F.2d 958, 961 (9th Cir. 1971); Falls Indus., Inc. v. Consolidated Chem. Indus., Inc., 258 F.2d 277, 285 (5th Cir. 1958). Accordingly, pleadings may be amended under Rule 15(b) after a jury verdict or the entry of judgment. Pomer v. Schoolman, 875 F.2d 1262, 1268 (7th Cir. 1989); Brown v. Ward, 438 F.2d 1285, 1286 (4th Cir. 1970) (per curiam); Falls Indus., 258 F.2d at 285. Rule 15(b) provides in relevant part:

> If evidence is objected to at the trial on the ground that is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant

> a continuance to enable the objecting party to meet such evidence.

Id.

At trial, World-Wide objected to evidence that the RTC-R was the owner of the guaranty. However, World-Wide failed to establish that admission of such evidence would prejudice World-Wide in maintaining its defense on the merits. World-Wide presented no reason why this amendment of the pleadings will prejudice it on the issue decided in this case: the construction of the World-Wide guaranty. Whether the RTC-R2 or the RTC-C is the named plaintiff has no bearing on the intention of the parties to a guaranty agreement between World-Wide and a defunct state savings association. The evidence at trial established that the RTC-R2 is the current owner and holder of the World-Wide guaranty. Accordingly, the motion to amend

the pleadings to reflect that fact is granted.

MOTION FOR JUDGMENT AND MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

The RTC-R2 moves for judgment based on its replacement of the RTC-C as the named party plaintiff. The jury found that the parties to the World-Wide guaranty agreement "intended at the time it was executed that World-Wide unconditionally guarantee full payment of the Note." The uncontroverted evidence indicates that the RTC-R2 is the current owner of the Note. Accordingly, judgment for the RTC-R2 is granted.

World-Wide opposes the RTC-R2's motion for judgment and moves for judgment notwithstanding the verdict on the ground that the RTC-C is not the owner of the guaranty at issue. World-Wide's motion is without merit. The issue is not, as World-Wide frames it, "whether the RTC-C,

who is not the owner and holder of the Note and Guaranty, is entitled to recover judgment against World-Wide." Rather, the issue is whether the RTC-R2, which succeeded to the interest of the RTC-C as a matter of law and properly replaced the RTC-C under Rule 25(c) is entitled to judgment on the jury verdict. This court finds that the RTC-R2 is entitled to judgment.

MOTION TO WITHDRAW ANNOUNCEMENT OF READY

World-Wide moves to withdraw its announcement of ready. World-Wide offers no reason or authority compelling or enabling this court to allow such a withdrawal after the conclusion of a trial. Accordingly, the motion is denied.

MOTION FOR REMAND

World-Wide moves to remand or dismiss for lack of jurisdiction on the grounds that federal subject matter jurisdiction is not available when the RTC is a party in

its capacity as a receiver of a state bank. World-Wide relies for its motion solely on FDIC v. La Rambla Shopping Ctr., Inc., 791 F.2d 215, 218-19 (1st Cir. 1986). World-Wide quotes from the La Rambla decision:

> ("When acting as a receiver of a closed bank, FDIC may deal with itself. Thus it may act in two capacities, as receiver and on its own behalf as insurer of deposits and often as a creditor."). Indeed, the very statute that allows the FDIC "to sue and be sued," specifies that all civil suits to which the Corporation shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof, without regard to the amount in controversy . . . except that any such suit to which the Corporation is a party in its capacity as receiver of a State Bank and which involves only the rights or obligations of depositors, creditors, stockholders, and such State bank under State law shall not be deemed to arise under the laws of the United States.

Id. (quoting 12 U.S.C. §1819 (Fourth)) (emphasis in original). World-Wide argues that the RTC is acting as receiver for Metro Financial, a state institution and that federal jurisdiction therefore does not attach. World-Wide's position is untenable in law and in fact.

World-Wide's legal reliance on La Rambla is misplaced. First, the La Rambla decision involved the FDIC, and application to the RTC can only be by analogy.[3] Second, the La Rambla decision no longer correctly states the law. FIRREA removed the distinction between the FDIC-Receiver and the FDIC-Corporate with regard to federal jurisdiction, placing suits where the FDIC is involved in either capacity under federal jurisdiction. 12 U.S.C.

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[3] The La Rambla decision's connection to any RTC issues is attenuated at best. The 1986 La Rambla decision predates the creation of the RTC by three years. See 12 U.S.C. 1441a(b)(1)(a) (Supp. 1992) (enacted August 9, 1989).

§1819(b)(2)(A); Demars v. First Serv. Bank for Sav., 907 F.2d 1237, 1240-41 n.7 (1st Cir. 1990). Third, and most importantly, FIRREA explicitly creates federal jurisdiction in suits involving the RTC. 12 U.S.C. §1441a(1). The statute does not distinguish between the RTC's capacity as receiver or conservator.

World-Wide's version of the facts is also incorrect. The RTC-R2 is not acting as the receiver of a state bank. The RTC became the receiver of Metro Financial, a state institution, on August 10, 1989. That same day, the RTC-R1 transferred Metro Financial's assets to Metro Federal, a newly created federal institution. The RTC-C became conservator of this new federal institution. A second and entirely new receivership for Metro Federal, the federal institution, came into existence on June 22, 1990. As a result, the out-dated

restrictions on jurisdiction over state bank actions do not apply to this action.

CROSS-CLAIMS AND COUNTERCLAIMS

Subject to its motion to dismiss or remand, World-Wide moves for leave to assert certain counterclaims. World-Wide seeks declaratory judgment that it has met its obligations under the guaranty agreement and for attorneys fees under the Uniform Declaratory Judgments Act. Tex. Civ. Prac. & Rem. Code Ann. §37.001 et. seq. (Vernons 1986). World-Wide also asserts causes of action for misrepresentation, fraud in the inducement, and conspiracy to defraud. World-Wide's post-trial assertion of counterclaims can only be filed with leave of court. Fed. R. Civ. P. 13(f). The decision whether to allow a counterclaim is within the trial court's discretion. McLemore v. Landry, 898 F.2d 996, 1003 (5th Cir.), cert. denied 111 S.Ct. 428 (1990); Rohner, Gerhrig & Co.

v. Capitol City Bank, 655 F.2d 571, 574 (5th Cir. Unit B Sept. 1981). In deciding a Rule 13(f) motion for leave to file a counterclaim, courts usually consider potential prejudice to the non-moving party and the neglect of the moving party in pursuing its counterclaim. See Rohner, Gerhrig, 655 F.2d at 287; Preferred Meal Sys. v. Save More Foods, Inc., 129 F.R.D. 11, 13 (D. D.C. 1990); Imperial Enter. Inc. v. Fireman's Fund Ins. Co., 535 F.2d 287, 293 (5th Cir. 1976); Hiddell v. International Diversified Invest., 520 F.2d 529, 539-40 (7th Cir. 1975).

World-Wide's counterclaims under the Uniform Declaratory Judgments Act involve the identical issues tried to the jury. Specifically, the jury determined that the agreement contemplated a full guaranty. To allow relitigation of this previously determined fact issue would clearly prejudice the RTC. Further, World-Wide

could have brought these counterclaims from the outset; these counterclaims are the mirror-opposite of the claims of the RTC and the findings of the jury. This court will not entertain the declaratory counterclaims.

Leave to file the fraud and conspiracy counterclaims is also denied. Trial on these issues would prejudice the RTC-R because World-Wide is estopped to assert these claims under 12 U.S.C. §1823(e) and the doctrine of D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942). Section 1823(e) bars claims based on either a failed institution's alleged fraudulent misrepresentation or an alleged conspiracy agreement unless the misrepresentation or conspiracy agreement complies with certain statutory requirements. Langley v. FDIC, 484 U.S. 86, 93-94 (1987); AmWest Savings Ass'n v Farmers Market of Odessa. Inc., 753 F.Supp. 1339, 1344-45 (W.D. Tex. 1990);

Bohm v. Forum Resorts, Inc., 762 F.Supp. 705, 711 (E.D. Mich. 1991); Mery v. Universal Sav. Ass'n, 737 F.Supp. 1000, 1002-04 (S.D. Tex. 1990). Such an agreement is not valid unless it (1) is in writing, (2) was executed contemporaneously with the acquisition of the asset by the depository institution, (3) is approved by the board of directors or the loan committee of the depository institution and such approval is reflected in the minutes of the board or committee, and (4) has been, continuously, since the time of its execution, an official record of the depository institution. 12 U.S.C. §1823(e). The D'Oench, Duhme doctrine estops an obligor from asserting claims of fraudulent inducement, conspiracy, and wrongful foreclosure against the RTC based on oral or unrecorded agreements or promises that attempt to vary the terms of facially unqualified written obligations. Amwest,

753 F. Supp. at 1344-45; Bohm, 762 F. Supp. 705, 711; Bertling, 751 F. Supp. at 1236-37. World-Wide asserts that §1823(e) and D'oench, Duhme do not apply to defeat its claims because the RTC-R2 is not a holder in due course under Texas law. An Erie determination of Texas law is unnecessary, however, because even if Texas law denied the RTC the benefit of D'oench, Duhme and §1823, federal law would apply. FSLIC v. Griffin, 935 F.2d 691, 697-98 (5th Cir. 1991), cert. denied 112 S.Ct. 1163 (1992). Federal law does not require an institution to be a holder in due course under state law to avail itself of the D'oench, Duhme doctrine or §1823(3). Adams v. Madison Realty & Dev., Inc., 937 F.2d 845, 855 (3d Cir. 1991).

In addition, World-Wide neglected to bring these counterclaims until after trial. World-Wide was on notice of the facts underlying any fraud and conspiracy

counterclaims well before trial in this case. No new information led to the assertion of these claims. By any reasonable measure, the appropriate time to assert these counterclaims passed long ago.

Accordingly, World-Wide's motion for leave to assert counterclaims is denied.

CONCLUSION

For the above stated reasons, the RTC-R's motions to substitute, to file an amended complaint, and for judgment are all GRANTED. World-Wide's motions for judgment notwithstanding the verdict, to withdraw announcement of ready, for remand or dismissal, and for leave to file a cross-claim or counterclaim are all DENIED.

SIGNED this 23rd day of July, 1992.

UNITED STATES DISTRICT JUDGE

93 - 525

NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM 1993

WORLDWIDE INSURANCE
MANAGEMENT CORPORATION,
Petitioner,

v.

RESOLUTION TRUST CORPORATION IN
ITS CAPACITY AS RECEIVER FOR
METROPOLITAN FINANCIAL FEDERAL
SAVINGS AND LOAN ASSOCIATION,
SUCCESSOR IN INTEREST TO METROPOLITAN
FINANCIAL SAVINGS AND LOAN ASSOCIATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

SUPPLEMENTAL APPENDIX

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TABLE OF CONTENTS

	PAGE
SUPPLEMENTAL APPENDIX	1
ORDER OF FIFTH CIRCUIT COURT OF APPEALS AFFIRMING THE DISTRICT COURT'S OPINION	3
ORDER OF FIFTH CIRCUIT COURT OF APPEALS DENYING MOTION FOR REHEARING	5

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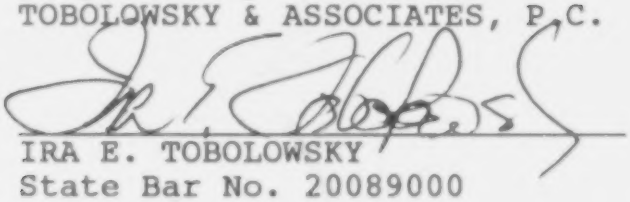
SUPPLEMENTAL APPENDIX

This Supplemental Appendix contains material inadvertently not included within

the Petition for Writ of Certiorari previously filed in this case.

Respectfully submitted,
TOBOLOWSKY & ASSOCIATES, P.C.



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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-1715

RESOLUTION TRUST CORPORATION,
as Receiver for Metropolitan Financial
Federal Savings and Loan Association,
Successor in Interest to Metropolitan
Financial Savings and Loan Association,

Plaintiff-Appellee,

versus

WORLDWIDE INSURANCE MANAGEMENT
CORPORATION, ET AL.

Defendants,

WORLDWIDE INSURANCE MANAGEMENT
CORPORATION

Defendant-Appellant.

Appeal from the United States
District Court for the
Northern District of Texas

(3:89-CV-2313-D)

Before GOLDBERG, GARWOOD and WIENER, Circuit Judges.*

PER CURIAM: AFFIRMED. See Local Rule 47.6.

Costs on Appeal are to be taxed against defendant-appellant.

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-1715

RESOLUTION TRUST CORPORATION,
as Receiver for Metropolitan Financial
Federal Savings and Loan Association,
Successor in Interest to Metropolitan
Financial Savings and Loan Association,

Plaintiff-Appellee,

versus

WORLDWIDE INSURANCE MANAGEMENT
CORPORATION, ET AL.

Defendants,

WORLDWIDE INSURANCE MANAGEMENT
CORPORATION

Defendant-Appellant.

Appeal from the United States
District Court for the
Northern District of Texas

ON PETITION FOR REHEARING

(June 1, 1993)

Before GOLDBERG, GARWOOD and WIENER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

s/Will Garwood
United States Circuit Judge